

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

No. 76-4085

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4085

STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents.

REPLY BRIEF OF PETITIONER

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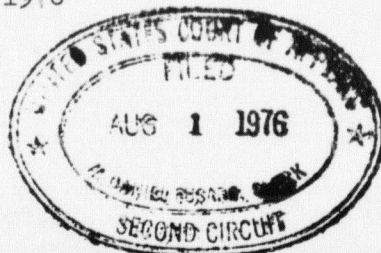


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INTRODUCTION

This case presents to the Court fundamental questions of discriminatory and prejudicial rail ratemaking. Wheat potentially can move to Martins Creek over an all rail route or a water/rail route. In either case the railroads control the ultimate delivered price of wheat. Here, the Erie Lackawanna Railway Company offered its rail connection at Chicago a rail rate that is half as much on a loaded per mile basis as the rail rate given to connecting water carriers at Buffalo. No justification for the maintenance of the high rail rate from the Port of Buffalo has been presented but admittedly the new low rail rate is designed to

divert traffic to the all rail route and away from the Port of Buffalo and the water carriers calling at Buffalo. The railroads are also giving preference to Martins Creek traffic by offering that point a rail rate competitive with a water/rail rate during the months when the Great Lakes are navigable. However, they do not offer Buffalo a competitive rate when the Great Lakes are navigable. In their briefs, respondents and intervening respondents give cursory treatment to the discriminatory nature of the involved rail rates. Rather, the primary thrust of their arguments is the unsound contention that the grave and pending questions of discrimination are not reviewable by this Court. Their procedural attack, however, is without merit and should not divert the Court's attention from the substantive issues presented.

I

THE MOTION TO PARTIALLY DISMISS
IS WITHOUT MERIT

Intervening Respondents Soo Line Railroad Company and ConAgra, Inc. have renewed their motion to partially dismiss the petition for review pending before this Court. On June 15, 1976, the Court, Judges J. Joseph Smith, Walter R. Mansfield, and James L. Oakes, denied the motion to partially dismiss but without prejudice to its renewal before the panel hearing the petition for review. The Court's prior consideration and denial of the motion would seem to indicate that this matter is not worthy of extended discussion. Nevertheless, in view of this Court's emphasis on the need for judicial efficiency, we will again fully answer it.^{1/}

^{1/} This Court has taken the leadership in promoting judicial efficiency, as evidenced, for example, by its adoption of the innovative "Revised Plan to Expedite the Processing of Criminal Appeals" (which in part embraces review of agency action). As we show, *infra*, if the motion is granted, parties to Interstate Commerce Commission proceedings will be required to burden the Court with so-called "protective" petitions for judicial review at various stages before the administrative process is completed.

Intervening respondents seek an order dismissing the petition for review insofar as it seeks review of (1) the report and order dated June 18, 1974 (served July 18, 1974) and (2) the order dated June 27, 1975 (served August 5, 1975). Intervenor contends that the Court is without jurisdiction to review the June 18, 1974 order because it was not a final order and that the June 27, 1975 order was a final order which should have been appealed within 60 days after its entry as provided in 28 U.S.C. § 2344.

These contentions are plainly untenable. Neither order was a final order but both are reviewable on review of the final order dated January 27, 1976 (served February 11, 1976). Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, specifically provides that "preliminary, procedural, or intermediate agency action not directly reviewable is subject to review on the review of the final agency action."

The first order dated June 18, 1974 (served July 18, 1974) provided as follows:

"It is ordered, That respondents be, and they are hereby notified and required to cancel the schedule described in the order of October 31, 1973, by the Commission, Division 2, Acting as an Appellate Division, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, without prejudice to the filing of a new schedule in conformity with the above-stated conclusions.

And it is further ordered, That the proceeding be, and it is hereby, discontinued." 346 I.C.C. at 856.

This order was not a final order and it never became effective. It was appealed to the Commission pursuant to Section 17(6) of the Interstate Commerce Act, 49 U.S.C. § 17(6).^{2/} The filing of an appeal in the form of a petition for reconsideration stays the effect of such an order. Section 17(8) of the Act, 49 U.S.C. § 17(8), specifically provides that when a

^{2/} The full text of Sections 17(6), 17(7) and 17(8) are set forth in the Appendix hereto.

petition for reconsideration is filed, the ". . . order . . . shall be stayed or postponed pending disposition of the matter by the Commission or appellate division." (Emphasis added.)

The procedural order dated June 27, 1975 (served August 5, 1975) did not discontinue the proceeding in any respect. It authorized intervention by the State of Pennsylvania; it denied petitions seeking reconsideration filed by some parties, including the State of New York; it granted some petitions; and it reopened the proceeding for reconsideration on the present record. The reopening of the proceeding on the present record clearly kept the matter pending before the Commission and the effect of the prior order dated June 18, 1974, continued to be postponed pursuant to Section 17(8). The schedule of rates filed on behalf of the railroads was not, in fact, cancelled in compliance with the order of June 18, 1974; new schedules were not filed in accordance with the conclusions in the first Commission report. Therefore, the Commission order of June 18, 1974, remained stayed and did not have an effect on any petitioner, regardless of whether its respective petition had been denied or granted by the order dated June 27, 1975.

The reason for providing that an appealed decision shall remain stayed while the case is pending before the Commission is set forth in Section 17(7), 49 U.S.C. § 17(7). Under Section 17(7) of the Act, an appellate division of the Commission is empowered to reverse, change or modify the original decision "in any respect." The granting of a petition for reconsideration does not compel the Commission to reach a decision different than the prior decision nor does it preclude the Commission from considering issues in petitions previously denied. Rather, when the appellate division reopens to consider the proceeding on the present record it is entitled to consider

the entire record and modify or change the original order which is "in any respect unjust or unwarranted." 49 U.S.C. § 17(7). Compare *Wilson v. United States*, 114 F. Supp. 814 (W.D.Mo. 1953); *Chicago and North Western Railway Co. v. United States*, 311 F. Supp. 860 (N.D.Ill. 1970); *United Trucking Service, Inc. v. United States*, 359 F. Supp. 100 (E.D.Mich. S.D. 1973); and *Resort Bus Lines, Inc. v. Interstate Commerce Commission*, 264 F. Supp. 742 (S.D.N.Y. 1967).^{3/}

This power to reconsider the entire record is exemplified by the involved proceeding. Respondents' claim that the Twin Ports rates were not a matter pending before the Commission is hollow. In its second report, the Commission specifically states:

"In issue are suspended unit-train proportional rates which became effective, as subsequently increased, on June 1, 1974, on wheat from . . . Twin Ports to Martins Creek." 351 I.C.C. at 472.

In its second report, the Commission recites the arguments made against the Twin Ports to Martins Creek rates; it states that it has given "careful review" to the prior decision of Division 2; it specifically adopts the prior findings of Division 2 as to the Twin Ports to Martins Creek rates; and it extends such findings to the Twin Cities to Martins Creek rates. 351 I.C.C. at 471,

^{3/} Intervening Respondents attempt to distinguish the *Resort* case on the ground that it involved an application by a motor carrier for a certificate of public convenience and necessity while this case involves railroad rates. This is a distinction without a difference since the power of the Commission to reconsider and rescind or modify an order "in any respect" is derived from the statute which applies to both types of proceedings. Further, *Transamerican Freight Lines, Inc. v. United States*, 258 F. Supp. 910 (D.C. Del. 1966), upon which Intervening Respondents rely for the proposition that "under the Interstate Commerce Act the Commission has no power to review an appellate division decision" has not been followed by the Commission or the Courts. See *Eazor Express, Inc. - Purchase - Fleet Highway Freight Lines, Inc.*, 101 M.C.C. 719 (1967); and *Chicago and North Western Railway Co. v. United States*, *supra*. As the Court noted in the *Chicago and North Western* case, the *Eazor* case was cited with apparent approval in *Resort Bus Lines, Inc. v. Interstate Commerce Commission*, *supra*.

473, and 479. The Commission's penultimate finding reads as follows:

"Upon reconsideration, we find the proposed unit-train rates from Twin Ports . . . to Martins Creek to be just and reasonable and not otherwise unlawful." 351 I.C.C. at 479.

Given the continuing stay of the first order by operation of law, the reopening of the proceeding on the present record, the Commission's power to consider all aspects of the pending matter upon reopening, and its actual reconsideration of the issues raised in petitions that were denied, it is clear that the order dated July 18, 1975 (served August 5, 1975) can only be viewed as a procedural order and not a final order disposing of the matter pending before the Commission. Indeed, counsel for the Commission tacitly admit in their brief that the disposition of the matter was still pending before the Commission. Counsel for the Commission suggest that "should a court action be commenced under these circumstances, the court could, in its discretion, decide to stay proceedings pending completion of the ancillary administrative proceedings." (Br., p. 11, fn. 7). It seems to us that to suggest that the Court should stay action on such a petition is to say that the proceeding is not ripe for judicial review.^{4/}

^{4/} As counsel for the Commission and counsel for petitioner pointed out at the oral argument on the motion, in August, 1974 counsel for petitioner was advised by Mrs. Betty Jo Christian, who was then the Commission's Associate General Counsel in charge of litigation and is now a Commissioner, that the Commission did not consider the order dated July 18, 1974 (served August 5, 1974) a final order. Mrs. Christian also indicated that the Commission would not raise this issue in any subsequent review proceedings. In any event, in view of this advice, it is clear that if petitioner had sought review of the July 18, 1975 order within 60 days of its entry, it would have been met with a motion to dismiss the petition on the ground that it was premature.

Counsel for the Commission purport to show that "a serious problem is created" if the July 27, 1975 order is not regarded as a final order. The problem they see is that "an agency could simply grant a petition for reconsideration of one part of an order, deny petitions for reconsideration of all other aspects of the same order, and thereby forestall judicial review indefinitely while the petition which was granted is under consideration." (Br., p. 11). Of course, if it has a mind to, an agency can forestall judicial review indefinitely by not issuing any order.

In any event, adoption of the position advocated by Respondents and Intervening Respondents would result in piecemeal review of agency action. If the July 27, 1975 order were truly an order subject to review by the Court, it would mean that the proceeding would be pending at the same time before both this Court and before the Commission. If the Court actually reviewed the July 27, 1975 order on the merits, it could again be called upon to review the subsequent Commission order dated January 27, 1976 (served February 11, 1976). Such piecemeal review would be in direct conflict with the whole purpose of having court review of only final orders.

The courts have previously been faced with the problems that would be created if the position advocated by Respondents and Intervening Respondents is adopted. Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, provides in part as follows:

"Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application * * * for any form of reconsideration, * * *"

Following adoption of the Act, the Court of Appeals for the Ninth Circuit decided *Consolidated Flower Shipments, Inc., -- Bay Area v. Civil Aeronautics Board*, 205 F. 2d 449 (1953), which held that a timely petition for reconsideration would not toll the 60 day statutory limit for seeking judicial review of a final order of the Civil Aeronautics Board.^{5/} In *Outtand v. C.A.B.*, 284 F. 2d 224 (1960), the Court of Appeals for the District of Columbia Circuit refused to follow *Consolidated Flower* and held "that when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the Board." 284 F. 2d at 228. The Court stated the ground of its holding as follows:

"[Section 704] does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon. The contrary result reached by the Ninth Circuit has caused parties to file so called 'protective' petitions for judicial review while petitions for rehearing before the Board were pending. A whole train of unnecessary consequences flowed from this: the Board and other parties may be called upon to respond and oppose the motion for review; when the Board acts, the petition for judicial review must be amended to bring the petition up to date." 284 F. 2d at 227-228.

Thereafter, in *Samuel B. Franklin & Co. v. Securities and Exchange Commission*, 290 F. 2d 719 (1961), the Ninth Circuit overruled its decision in *Consolidated Flower* and held that the timely filing of a petition for reconsideration does toll the 60 day period for appeal. The Court stated:

^{5/} There is no express statutory authority requiring petitions for reconsideration to be filed before seeking judicial review of orders of the Civil Aeronautics Board. In fact, there is no express statutory authority for the Board to entertain such petitions.

"A holding that a petition for a rehearing before an agency tolls the running of the period for filing a petition for a review will permit an agency to have an opportunity to reconsider its decision and possibly to correct any errors or misunderstandings concerning it. Counsel will not have to file a protective appeal in the event that the agency has not passed upon the petition for rehearing within sixty days." 290 F. 2d at 725.

We submit that the same practical considerations which dictated the result reached in *Outtand* and *Samuel B. Franklin & Co.* dictate a similar result here.

Respondents and Intervening Respondents have cited no cases in point. For the most part, the cases upon which they rely were not concerned with the "timeliness" of appeals. Rather, they dealt with what this Court has called "the elusive concept of finality" or "the related and often overlapping doctrines of ripeness and exhaustion of administrative remedies" which are employed by courts "to determine whether or when they should inject themselves into the administrative process." *Aquavella v. Richardson*, 437 F. 2d 397, 403 (2nd Cir. 1971). In that case, the district court dismissed a complaint for lack of jurisdiction on the ground that the suspension of payments under the Medicare Act to a nursing home was not "final action under section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706." This court reversed, stating:

"Whether an agency action is final for purposes of the APA should not depend on semantic characterizations but rather on a careful evaluation of the separate but coordinate functions of courts and administrative agencies and of the impact of the challenged action on the parties." 437 F. 2d at 404-405.

While this is not a case where the Court is being asked to inject itself into the administrative process, to the extent that the principles governing such cases apply to this case, they fully support our position. As we have shown, the procedural order dated June 27, 1975 (served August 5, 1975) had no impact on petitioner and the respective functions of the courts and the Commission will be accomplished in a more orderly and efficient manner if the administrative process is permitted to run its course without judicial interference at the preliminary stages of Commission proceedings.

Moreover, there are other factors that govern cases such as this. As the Supreme Court pointed out in *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 327 (1961), "a court considering the timeliness of a litigant's appeal is concerned with the wisdom of exercising its own power to act, and the result depends on such factors as fairness to the appellant and the intent of Congress is passing a general statute -- Section 10(c) of the Administrative Procedure Act -- which applies equally to almost all administrative agencies."

Here, we submit, it would be unfair to limit the scope of review to certain issues because petitioner chose to await the outcome of the Commission proceeding before filing its petition for review. Further, as the court stated in *Samuel B. Franklin & Co. v. Securities and Exchange Commission, supra*, "that portion of the Administrative Procedure Act which defines 'agency action' suggests that the purpose of the Act was to increase, or at least not to decrease, the scope of administrative procedures as they had been developed prior to the adoption of the APA." (Footnote omitted.) 29 F. 2d at 723.

Finally, in *Buckeye Cablevision, Inc. v. United States*, 438 F. 2d 948 (6th Cir. 1971), the Federal Communications Commission challenged the jurisdiction of the Court to consider issues arising from orders which were related to the order under review but which were "final and no longer subject to review." The Commission contended that the Court had "jurisdiction to review only final orders of the administrative agencies timely appealed and the scope of the review is limited to the subject matter of those properly appealed final orders." The Court held:

"We conclude that this court does have jurisdiction to consider the issues raised by *Buckeye* on this appeal. First, challenges to administrative substantive and procedural rules would most logically be raised by immediate appeal from the adoption of those rules. However, failing an immediate appeal does not foreclose raising the issue of the validity of the adoption of these administrative rules in an enforcement proceeding which directly involves the question of the validity of the adoption of the rules." 438 F. 2d at 951.

So here, assuming *arguendo* that petitioner's appeal was untimely with respect to the issue of the validity of the Twin Ports to Martins Creek rates, it would not be foreclosed from raising that issue in a proceeding involving the validity of the related Twin Cities to Martins Creek rates. Indeed, since the justification for the Twin Cities rates is based solely on "market competition" with Twin Ports, the Court cannot determine their validity without examining the Twin Ports rates.

For all of the foregoing reasons, petitioner respectfully requests that the Court affirm its prior ruling denying the motion to partially dismiss the pending petition for review.

II

THE SECTION 3(4) ISSUE
IS PROPERLY BEFORE THE COURT

The second procedural challenge is not as vigorously pursued but it, too, will be fully answered. Counsel for Respondents and Intervening Respondents cite *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952), for the proposition that the State of New York cannot raise the section 3(4) issue because this issue was not raised in its petition for reconsideration.

Again, counsel's contention is plainly untenable. The best answer to the contention that the section 3(4) issue was not before the Commission in its second report is the Commission's own statements in its second report:

"It is alleged that the proposal violates section[s]
. . . 3(4) of the Act." 351 I.C.C. at 473.

* * *

"Division 2 also dismisses as being without merit various allegations that such proposed rates violate section[s] . . . 3(4) of the Act. Sound reasons in support of Division 2's conclusions are set forth in the prior report, and we likewise adopt such findings and conclusions as our own." 351 I.C.C. at 479.

Obviously, the Commission itself recognized that the section 3(4) issue was before it when it issued its report and order on reconsideration.

Since the whole rationale behind the *Tucker* case centers around the fairness of court review of issues never before the agency, this rule obviously does not, and should not apply, to the situation here. Not only was the issue before the agency but the agency specifically stated that it considered the issue and it again ruled on the issue. Moreover, the agency rationale underlying its decision is available to the Court and it is this same rationale that is being challenged by the State of New York. The fact

that New York did not raise the section 3(4) issue is immaterial since the issue was, in fact, raised and considered by the Commission. Cf. *Buckeye Cablevision, Inc. v. United States*, supra; *Wilson & Co. v. United States*, 335 F. 2d 788, 794 (7th Cir. 1964); *Hennesey v. S.E.C.*, 285 F. 2d 51 (3rd Cir. 1961). This general proposition was clearly stated in *Great Falls Community TV Cable Co. v. F.C.C.*, 416 F. 2d 238 (9th Cir. 1969):

"Where the agency has been afforded a full opportunity to pass on an issue, courts have not always insisted on strict application of the rule. See, e.g., *Titusville Cable TV Inc. v. United States*, 404 F. 2d 1187, 1189 (3d Cir. 1968); *Wilson & Co. v. United States*, 335 F. 2d 788, 794 (7th Cir. 1964); *Gerico Inv. Co. v. FCC*, 99 U.S. App. D.C. 379, 240 F. 2d 410, 411 (1957); cf. *Hennesey v. SEC*, 285 F. 2d 511, 515 (3d Cir. 1961).

* * *

"The first three issues were raised, considered, and rejected by the Commission in two separate rule-making proceedings, notable for the vigor and extent of the participation by spokesmen on every side of the CATV-regulation controversy. It would therefore be wholly unreal to say that the Commission has had 'no opportunity to pass' on these issues. Moreover, in the rule-making proceedings, the Commission decided these issues, fully stating the reasons for its conclusions. Thus, we have the benefit of the Commission's expert views on the difficult problems involved." (Footnotes omitted.) 416 F. 2d at 239.

This same approach has been followed in cases involving orders of the Interstate Commerce Commission. In *Lake Carriers' Association v. United States*, 399 F. Supp. 386 (N.D. Ohio 1975), the Court noted that the plaintiff itself had not raised the issue of a section 3(1) violation but that another party had, that the Commission addressed itself to the matter, and that the Court had the benefit of the Commission's views. 399 F. Supp. at 395, 396.

The Court also noted that rules of procedure are not inflexible and should not be used to defeat the needs of justice. It then held:

"For these reasons and because the issue involves questions of public policy under the regulatory scheme of the Act, we shall proceed to consider the issue on the merits." 399 F. Supp. at 396.

The section 3(4) issue here contains the same questions of public policy and this Court should likewise consider the case on the merits.

III

THE DEFENSE OF THE SECTION 3(4) ISSUE IS WIDE OF THE MARK

Counsel for Respondents and Intervening Respondents raise three minor and technical arguments in defense of the Commission decision which sweeps water carriers on the Great Lakes out from under the protection afforded connecting lines under section 3(4) of the Act. They first urge that since Rule 1100.19 of the Commission's General Rules of Practice does not make matters in petitions for suspension automatically part of the record, the Commission cannot be held accountable for its failure to recognize that certain water carriers on the Great Lakes are subject to Part III of the Interstate Commerce Act, 49 U.S.C. § 901, *et seq.* However, the Court should keep in mind that at the time the hearing was held in this proceeding, the rail rates were not in effect, and any diversion of wheat traffic from any water carrier would and could only occur sometime in the future. Therefore, it was impossible for any water carrier, subject to Part III or otherwise, to come forward and identify itself as the particular water carrier to be injured. Accordingly, the Commission was compelled to consider the interest of the Great Lakes carriers as a whole. Given the necessity to consider water carrier interest in unison, the Court precedent regarding protection of Great Lakes

water carriers which was pointed out to the Commission (346 I.C.C. at 849), the Commission's own public records showing that Great Lakes water carriers are subject to Part III, and the fact that the carriers identified themselves as subject to Part III in the petitions for suspension filed with the Commission in this proceeding, the existence of Rule 1100.19 obviously cannot be a defense against the Commission's failure to extend section 3(4) protection.

The second argument of Counsel for Respondents and Intervening Respondents relates to their unique reading of the Commission's decision in *Ingot Molds, Ohio and Pa. to Cyress, Tex.*, 349 I.C.C. 102 (1975). In its decision the Commission specifically stated:

"With regard to the competing all-rail and barge-rail routes, the last leg of both is via the SP -- with the barges interchanging at Houston, Tex., and the railroads interchanging at either Shreveport, La., or Corsicana, Tex., as depicted below:" 349 I.C.C. at 107.

The Commission then went on to require the cancellation of the rates applicable over the all rail routes both via Corsicana and Shreveport. The Corsicana route did not include Houston, the point of water-rail connection, as an intermediate point on the all rail route just as Buffalo is not an intermediate point on the all rail route at issue here. To urge that the *Ingot Molds* case stands for the proposition that the point of connection between the water and rail carriers must be an intermediate point on the all rail route is to render the decision meaningless. Certainly, the decision in the *Ingot Molds* case would be utterly meaningless if that decision truly meant that the railroads could continue to maintain discriminatory rates so long as they routed traffic over the Corsicana route. Hence, just as the

previous Commission view that a common point of interchange was necessary for section 3(4) protection was struck down as being irrational, so, too, should the proposition that the point of rail-water interchange must be an intermediate point on the all rail route. No reasonable basis exists for either contention as amply demonstrated by the *Ingot Molds* case.

Lastly, counsel for Respondents and Intervening Respondents put to the Court the absurd proposition that section 3(4) does not apply since ConAgra routes the traffic.^{6/} They cite no precedent for this proposition and give no reasonable explanation why the Court should accept it. Nor can they, for their reading is plainly wrong. The Interstate Commerce Act preserves to the shipper the right to route traffic. 49 U.S.C. § 15(8). The shipper routing exception in section 3(4) is designed to protect a railroad against the charge of discrimination in those instances where it fails to give a connecting line traffic because it is following shipper routing instructions via another connecting line. It is not a defense against the establishment of a discriminatory rate structure. Were this not so, section 3(4) would be a dead-letter statute for a shipper would always agree to route traffic in a manner necessary to have lower rail rates put into effect.

The briefs of Respondents and Intervening Respondents raise no matters detracting from the facts and argument set forth in Petitioner's opening brief showing that the Commission decision erroneously deprived water carriers on the Great Lakes of their statutory right to be protected from

^{6/} Of course, the Commission made no such finding. Hence, counsel are asking this Court to do what the Supreme Court of the United States has held courts may not do, namely, "accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

discriminatory rail rates under section 3(4) of the Act. Hence, petitioner renews its request for judgment on the merits in its favor.

IV

THE SECTION 3(1) ISSUE
IS PROPERLY BEFORE THE COURT
AND WARRANTS REMAND ON THE MERITS

Respondents and Intervening Respondents again seek to prevent court review by claiming that the section 3(1) issue is not before the Court but since it is, they vainly seek to distinguish the remarkably similar *Lake Carriers'* case, *supra*. The Commission's reports are replete with references to the section 3(1) issue and they will not be quoted.

Respondents and Intervening Respondents attempt to distinguish the *Lake Carriers'* case on the grounds that here no one asked the railroads to lower their rates and no cost data was introduced by the interests now represented by the State of New York. But the *Lake Carriers'* case involved a complaint and placed the burden of showing that the unequal treatment was not justified on the complaining party. This case involves a suspension and investigation of rates and places the burden on the railroads to justify the unequal treatment. Under the rule set forth in *Seatrail Lines, Inc. v. United States*, 233 F. Supp. 199 (N.J. 1964) and *Western Pacific Railroad Company v. United States*, 263 F. Supp. 140 (N.D.Cal. 1966), petitioner and the interests it represents met their burden before the Commission by showing (1) a disparity in rates -- the Buffalo rates being twice as high on a loaded/permile basis, (2) a potential for injury -- the all rate route diverting as much as 3,500,000 bushels of wheat away from the Port of Buffalo, and (3) a common source of injury -- the Erie Lackawanna. The burden then shifted to the railroads to justify, by cost data or otherwise, their discriminatory treatment

of the Buffalo interests. The Buffalo interests did not have the burden of showing how the discrimination should be cured and did not have the obligation to seek lower rail rates from Buffalo or to attempt to cost justify lower rail rates from Buffalo. The *Lake Carriers'* precedent is applicable here and compels a remand to the Commission.

One last point needs to be mentioned. Intervening Respondents state as their final contention that the State of New York has not addressed itself to the issues presented by the Twin Cities to Martins Creek summer rate. This assertion exhibits a lack of understanding of the fundamental issues presented in this case. The Twin Cities to Martins Creek rate stands in no different posture than the Twin Ports to Martins Creek rate. In fact, since its existence depends upon market competition with Twin Ports, its lawfulness is wholly dependent upon the lawfulness of the Twin Ports/Martins Creek rate. If the Twin Ports to Martins Creek rate is struck down for any reason whatsoever, the Twin Cities to Martins Creek rate must also fall. Therefore, arguments applicable to the Twin Ports rate also apply to the Twin Cities rate and highlight the futility of respondents' arguments concerning reviewability of the issues presented to this Court.

Respectfully submitted,

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Dated: July 29, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of July, 1976,
served two copies of the foregoing Reply Brief upon all parties of record
in this proceeding, by first class mail, properly addressed with postage
prepaid.

Patrick McEligot
Patrick McEligot

49 U.S.C. Section 17(6)

After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

49 U.S.C. Section 17(7)

If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse,

change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

49 U.S.C. Section 17(8)

Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.